

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHN JOEY MARKS,
Petitioner,
v.

Case No. 2:17-cv-01413-JCM-PAL

ORDER

CALVIN JOHNSON, *et al.*,
Respondents.

Introduction

This habeas corpus action is brought by Nevada prisoner John Joey Marks, who is incarcerated at Nevada's High Desert State Prison. Marks is represented by appointed counsel. The respondents have filed a motion to dismiss arguing that all Marks' claims are barred by the procedural default doctrine. The Court will deny the motion to dismiss, without prejudice to Respondents asserting the procedural default defense in their answer, as is explained below.

Background

On July 2, 2015, Marks was convicted, upon a guilty plea, in Nevada's Eighth Judicial District Court, in Clark County, of robbery with use of a deadly weapon, and he was sentenced, as a habitual offender, to 20 years in prison, with minimum parole eligibility of 8 years. See Judgment of Conviction, Exh. 7 (ECF No. 29-7). Marks did not appeal from the judgment of conviction.

Marks filed a *pro se* state habeas petition on March 30, 2016. See Petition for Writ of Habeas Corpus, Exh. 14 (ECF No. 29-14). The state district court denied Marks' petition in a written order filed on August 9, 2016. See Findings of Fact, Conclusions of

1 Law and Order, Exh. 30 (ECF No. 29-30). Marks appealed. See Appellant's Opening
 2 Brief, Exh. 34 (ECF No. 29-34). The Nevada Court of Appeals affirmed the denial of
 3 Marks' petition on November 18, 2016. See Order of Affirmance, Exh. 40 (ECF No. 30-
 4 5). The court denied rehearing on January 27, 2017. See Order Denying Rehearing,
 5 Exh. 42 (ECF No. 30-7).

6 This Court received a *pro se* petition for writ of habeas corpus from Marks,
 7 initiating this action, on May 16, 2017. See Petition for Writ of Habeas Corpus (ECF No.
 8 4). The Court granted Marks's motion for appointment of counsel and appointed counsel
 9 to represent him. See Order entered June 1, 2017 (ECF No. 3). With appointed counsel,
 10 Marks filed a first amended petition on June 23, 2017 (ECF No. 7), and a second
 11 amended petition on February 28, 2018 (ECF No. 20). In his second amended petition,
 12 his operative petition, Marks asserts the following grounds for habeas corpus relief:

13 1A. Marks' guilty plea was not entered into knowingly, intelligently, or
 14 voluntarily, because of his low intellectual functioning, mental illness and
 traumatic brain injury.

15 1B. Marks' guilty plea was not entered into knowingly, intelligently, or
 16 voluntarily, because his trial counsel placed undue pressure on him and
 coerced him into accepting the State's offer.

17 2. Marks was improperly sentenced as a habitual offender, because
 18 constitutionally invalid prior felony convictions were used to enhance his
 sentence.

19 3A. Marks received ineffective assistance of his trial counsel, because
 20 counsel advised him to plead guilty without a determination of his
 competence.

21 3B. Marks received ineffective assistance of his trial counsel, because
 22 counsel failed to adequately investigate his case.

23 3C. Marks received ineffective assistance of his trial counsel, because
 24 counsel failed to challenge the prior convictions used to enhance his
 sentence.

25 3D. Marks received ineffective assistance of his trial counsel, because
 26 counsel failed to consult with him regarding his right to appeal and failed
 to file a notice of appeal on his behalf.

27 Third Amended Petition (ECF No. 20).
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1 On August 29, 2018, Marks filed a motion for stay (ECF No. 36), conceding that
2 claims in his second amended petition were unexhausted in state court. Respondents
3 did not oppose the motion for stay, and the case was stayed on September 19, 2018,
4 pending Marks' further state-court proceedings. See Order entered September 19, 2018
5 (ECF No. 38).

6 Meanwhile, on April 13, 2018, Marks initiated a second state habeas action. See
7 Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 46 (ECF No. 30-11). The
8 state district court denied the petition in a written order filed on September 17, 2018.
9 See Findings of Fact, Conclusions of Law and Order, Exh. 66 (ECF No. 53-3). The
10 Nevada Court of Appeals affirmed on July 30, 2019, ruling that Marks' petition was
11 procedurally barred. See Order of Affirmance, Exh. 62 (ECF No. 40-2).

12 The stay of this action was lifted on October 18, 2019. See Order entered
13 October 18, 2019 (ECF No. 41). Marks gave notice that further amendment of his
14 petition was unnecessary (ECF No. 42). On July 17, 2020, Respondents filed the
15 motion to dismiss that is now before the Court (ECF No. 52), contending that all Marks'
16 claims are barred by the procedural default doctrine. Marks filed an opposition to the
17 motion on October 29, 2020 (ECF No. 56). Respondents replied on January 11, 2021
18 (ECF No. 61).

19 Discussion

20 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails
21 to comply with the state's procedural requirements in presenting his claims is barred by
22 the adequate and independent state ground doctrine from obtaining a writ of habeas
23 corpus in federal court. *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991) ("Just as
24 in those cases in which a state prisoner fails to exhaust state remedies, a habeas
25 petitioner who has failed to meet the State's procedural requirements for presenting his
26 federal claims has deprived the state courts of an opportunity to address those claims in
27 the first instance."). Where such a procedural default constitutes an adequate and
28 independent state ground for denial of habeas corpus, the default may be excused only

1 if “a constitutional violation has probably resulted in the conviction of one who is actually
2 innocent,” or if the prisoner demonstrates cause for the default and prejudice resulting
3 from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

4 To demonstrate cause for a procedural default, the petitioner must “show that
5 some objective factor external to the defense impeded” his efforts to comply with the
6 state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external
7 impediment must have prevented the petitioner from raising the claim. See *McCleskey*
8 *v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner
9 bears “the burden of showing not merely that the errors [complained of] constituted a
10 possibility of prejudice, but that they worked to his actual and substantial disadvantage,
11 infecting his entire [proceeding] with errors of constitutional dimension.” *White v. Lewis*,
12 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170
13 (1982).

14 In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective
15 assistance of post-conviction counsel may serve as cause, to overcome the procedural
16 default of a claim of ineffective assistance of trial counsel. In *Martinez*, the Supreme
17 Court noted that it had previously held, in *Coleman*, that “an attorney’s negligence in a
18 postconviction proceeding does not establish cause” to excuse a procedural default.
19 *Martinez*, 566 U.S. at 15. In *Martinez*, however, the Supreme Court established an
20 equitable exception to that rule, holding that the absence or ineffective assistance of
21 counsel at an initial-review collateral proceeding may establish cause to excuse a
22 petitioner’s procedural default of substantial claims of ineffective assistance of trial
23 counsel. See *Martinez*, 566 U.S. at 9. The Court described “initial-review collateral
24 proceedings” as “collateral proceedings which provide the first occasion to raise a claim
25 of ineffective assistance at trial.” *Id.* at 8.

26 In this case, it appears undisputed that Marks did not raise, in his first state
27 habeas action, any of the claims that he asserts in his second amended petition in this
28 case, that all his claims were ruled procedurally barred in his second state habeas

1 action, and that, therefore, all his claims are potentially subject to denial in this case
2 under the procedural default doctrine. Marks, though, argues that he can show cause
3 and prejudice to overcome the procedural defaults. Marks argues that there is cause
4 and prejudice as to all his claims on account of his intellectual disability, which,
5 according to Marks, rendered him unable to comply with State procedural requirements.
6 See Opposition to Motion to Dismiss (ECF No. 56), pp. 2–6. In addition, with respect to
7 his claims of ineffective assistance of trial counsel, Marks argues that there is cause
8 and prejudice under *Martinez* because he did not have counsel in his first state habeas
9 action. See *id.* at 6–11.

10 The Court determines that the issues raised by Respondents’ motion to dismiss
11 are intertwined with the merits of Marks’ claims, such that the question of the potential
12 procedural defaults will be better considered in conjunction with the merits of the claims,
13 after Respondents file an answer, and Marks files a reply. The Court will, therefore,
14 deny the motion to dismiss without prejudice to Respondents asserting procedural
15 default as a defense to Marks’ claims in their answer. Respondents’ answer should
16 address both the question of procedural default and the merits of each of Marks’ claims.

17 **IT IS THEREFORE ORDERED** that Respondents’ Amended Motion to Dismiss
18 (ECF No. 52) is **DENIED**.

19 **IT IS FURTHER ORDERED** that Respondents will have 90 days from the date of
20 this order to file an answer, responding to all the claims in Petitioner’s Second Amended
21 Petition for Writ of Habeas Corpus (ECF No. 20). In all other respects, the schedule for
22 further proceedings set forth in the Order entered October 18, 2019 (ECF No. 41) will
23 remain in effect.

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James C. Mahan
JAMES C. MAHAN,
UNITED STATES DISTRICT JUDGE